



### **PARTIES**

3. Plaintiff is a non-profit, educational foundation organized under the laws of the District of Columbia and having its principal place of business at 425 Third Street, S.W., Suite 800, Washington, DC 20024. Plaintiff seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. In furtherance of its public interest mission, Plaintiff regularly requests access to the public records of federal, state, and local government agencies, entities, and offices, and disseminates its findings to the public.

4. Defendant DOJ is an agency of the United States Government and is headquartered at 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001. Defendant HUD is an agency of the United States Government and is headquartered at 451 7<sup>th</sup> St., S.W., Washington, D.C. 20410. Defendants HUD and DOJ have possession, custody, and control of records to which Plaintiff seeks access.

### **STATEMENT OF FACTS**

5. On May 17, 2011, Plaintiff submitted a FOIA request to Defendant DOJ and a separate FOIA request to Defendant HUD, by facsimile and certified mail, seeking access to certain public records which had been mentioned the previous day in the online Huffington Post. Plaintiff explained in both of these records requests that at 4:42 p.m. on May 16, 2011, Shahien Nasiripour of The Huffington Post published online a news article asserting that four federal officials had briefed him on a set of audits accusing “the nation’s five largest mortgage companies of defrauding taxpayers in their handling of foreclosures on homes purchased with government backed loans.” Plaintiff also stated in its letters to both Defendants DOJ and HUD that “in the next to last paragraph of the May 16 article, Nasiripour further referred to a term sheet that federal officials

had disclosed to him the week before.” Plaintiff then requested the following documents from Defendant DOJ and from Defendant HUD:

- a) The set of audits accusing “the nation’s five largest mortgage companies of defrauding taxpayers in their handling of foreclosures on homes purchased with government-backed loans”; and,
- b) The term sheet outlining for “the creation of a federal account funded by the nation’s 14 largest mortgage firms to help distressed borrowers avoid foreclosure and settle ongoing probes into faulty mortgage practices.”

6. According to a letter from Defendant DOJ dated June 6, 2011, DOJ received Plaintiff’s FOIA Request on May 27, 2011.

7. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), Defendant DOJ’s response to Plaintiff’s May 17, 2011 FOIA request was due within twenty working days of May 27, 2011, or by June 24, 2011.

8. Defendant DOJ indicated in its June 6, 2011 letter that it “would be unable to comply with the twenty-working day time limit in this case as well as the ten additional days provided for by the statute.”

9. On September 22, 2011, Defendant DOJ sent Plaintiff a letter which stated that searches for the documents requested had been conducted in the Office of the Attorney General, the Departmental Executive Secretariat, the Office of the Deputy Attorney General, and Associate Attorney General. The letter also stated that nine documents totaling 346 pages were located that are responsive to Plaintiff’s request, and that Defendant DOJ referred these documents to Defendant HUD for processing and direct response to Plaintiff. This letter constituted Defendant DOJ’s final response.

10. Plaintiff administratively appealed Defendant DOJ's final response on September 27, 2011. *See* Exhibit 1. On October 11, 2011, Defendant DOJ acknowledged that Plaintiff's administrative appeal was received on September 27, 2011.

11. Defendant DOJ denied Plaintiff's administrative appeal on November 23, 2011. *See* Exhibit 2.

12. Because Plaintiff timely appealed Defendant DOJ's failure to produce responsive records, and received a final denial from Defendant DOJ, Plaintiff has exhausted any and all administrative remedies with respect to its May 17, 2011 FOIA request to Defendant DOJ.

13. According to a letter from Defendant HUD dated June 14, 2011, HUD received Plaintiff's FOIA request on May 18, 2011.

14. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), Defendant HUD's response to Plaintiff's May 17, 2011 FOIA request was due within twenty working days of May 18, 2011, or by June 16, 2011.

15. On September 13, 2011, Defendant HUD sent a response to Plaintiff stating that "the records that are responsive to your request are being withheld in full pursuant to 5 U.S.C. § 552 (b)(5) ... and 5 U.S.C. § 552(b)(7)." Defendant HUD also stated that "there may be other exemptions (e.g. 5 U.S.C. § 552(b)(3), (b)(6) and (b)(7)(C)) associated with these records that we have not addressed in this response and that we expressly reserve." Defendant HUD instructed Plaintiff that it could administratively appeal the denial of information with a written appeal filed within 30 days from the date of the letter.

16. Plaintiff timely administratively appealed on September 26, 2011. *See* Exhibit 3.

17. By letter dated October 19, 2011, Defendant HUD denied Plaintiff's administrative appeal. *See* Exhibit 4.

18. Because Plaintiff timely appealed Defendant HUD's failure to produce responsive records, and received a final denial from Defendant HUD, Plaintiff has exhausted any and all administrative remedies with respect to its May 17, 2011 FOIA request to HUD.

**COUNT 1**  
**(Violation of FOIA, 5 U.S.C. § 552)**

19. Plaintiff realleges paragraphs 1 through 19 as if fully stated herein.

20. Defendants are unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.

21. Plaintiff is being irreparably harmed by reason of Defendants' unlawful withholding of requested records, and Plaintiff will continue to be irreparably harmed unless Defendants are compelled to conform their conduct to the requirements of the law.

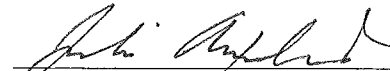
WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant HUD and Defendant DOJ to conduct a search for any and all responsive records to Plaintiff's May 17, 2011 FOIA requests to Defendant HUD and Defendant DOJ and demonstrate that they employed search methods reasonably likely to lead to the discovery of all records responsive to Plaintiff's FOIA request; (2) order Defendant DOJ and Defendant HUD to produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a *Vaughn* index of any responsive records withheld under claim of exemption; (3) enjoin Defendant DOJ and Defendant HUD from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably

incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated: January 3, 2012

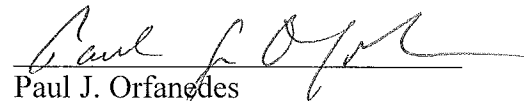
Respectfully submitted,

JUDICIAL WATCH, INC.



Julie Axelrod

D.C. Bar No. 1001557  
425 Third Street, SW, Suite 800  
Washington, DC 20024  
(202) 646-5172



Paul J. Orfanedes

D.C. Bar No. 429716  
425 Third Street, SW, Suite 800  
Washington, DC 20024  
(202) 646-5172

*Attorneys for Plaintiff*

## **Exhibit 1**

TRANSMISSION VERIFICATION REPORT

TIME : 09/27/2011 17:46  
NAME : JUDICIAL WATCH  
FAX : 2026460190  
TEL : 2026465172  
SER.# : 00068N646578

DATE, TIME  
FAX NO./NAME  
DURATION  
PAGE(S)  
RESULT  
MODE

09/27 17:33  
2025141009  
00:13:17  
20  
OK  
STANDARD

425 Third St. SW, Suite 800  
Washington, DC 20024  
Phone: 202-646-5172  
Fax: 202-646-5199

**Judicial Watch**

**Fax**

To: Melanie Rustay From: Lisette Garcia  
Fax: (202) 514-1009 Date: Sept. 27, 2011  
Re: FOIA APPEAL II Pages: (including cover) 20

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Print to follow by cert. mail:

7011 0470 0001 2912 1112

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT  
OF THE RETURN ADDRESS. FOLD AT DOTTED LINE

**CERTIFIED MAIL™**



7011 0470 0001 2912 1112





**Judicial  
Watch®**  
*Because no one  
is above the law!*

September 27, 2011

**VIA CERTIFIED MAIL & FACSIMILE (202) 514-1009**

Melanie Pustay, Director  
Office of Information Policy  
U.S. Department of Justice  
1425 New York Ave., N.W.  
Suite 11050  
Washington, D.C. 20530-0001

**Re: FOIA Appeal II Re: 2376216 Seeking a Set of Audits and Term Sheet**

Dear Ms. Pustay:

This letter timely appeals the most recent adverse determination within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. § 552,<sup>1</sup> and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*<sup>2</sup> respecting 2376216, a request for documents placed with the U.S. Department of Justice (Justice) on May 17, 2011 by Judicial Watch, Inc., (Judicial Watch).<sup>3</sup> Request 2376216 sought, by expedited processing, two documents publicized by Shahien Nasiripour in the Huffington Post on

---

<sup>1</sup> FOIA provides in pertinent part “the right of [a requester] to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552 (a)(6)(A)(i).

<sup>2</sup> *Reliance Electric Co. v. Consumer Product Safety Cmsn.*, 924 F.2d 274, 277 (D.C. Cir. 1991) (reasoning that, apart from the substantive elements expressly addressed within 5 U.S.C. § 552(b), there is a procedural aspect to an agency’s compliance with FOIA which constitutes an “informal adjudication” subject to judicial review per terms set forth in the Administrative Procedure Act, 5 U.S.C. § 706) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 287, 317-18, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325 (D.C. Cir. 1989); and, *AT&T Information-Systems, Inc. v. General Services Admin.*, 258 App. D.C. 254, 810 F.2d 1233, 1236 (D.C. Cir. 1987)).

<sup>3</sup> The original FOIA is attached to this appeal and labeled Exhibit A.

**Justice**

**Sept. 27, 2011**

May 11 and May 16, respectively.<sup>4</sup> This appeal does not challenge Justice's earlier refusal to expedite processing of request 2376216<sup>5</sup> despite Judicial Watch's compelling need for the items sought thereby<sup>6</sup>; rather, Judicial Watch respectfully appeals Justice's express determination to rid itself of responsive records in order to avoid fulfillment of Judicial Watch's FOIA by the terms of the request and in accordance with all relevant statutes.<sup>7</sup> Judicial Watch also presses its earlier claim that, in further violation of all applicable statutes, Justice took an inordinately long time to notify Judicial Watch of the agency's denial in an apparent effort to inhibit the widest possible dissemination of information of paramount public importance.<sup>8</sup> This injury is compounded by the fact that federal officials already disclosed the information at issue to a single media outlet.<sup>9</sup>

#### **I. Justice Took Four Months to Say No in Violation of FOIA and APA**

"[E]ach agency, upon any request for records which reasonably describes such records and is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records *promptly* available to any person." 5 U.S.C. § 552 (a)(3)(A) (emphasis added). Promptly, for purposes of FOIA,

---

<sup>4</sup> Relevant portions of the referenced articles are attached here as Exhibit B.

<sup>5</sup> Justice's June 6 letter refusing expedited processing is here attached as Exhibit C.

<sup>6</sup> 5 U.S.C. § 552 (a)(6)(E)(v)(II) defines compelling need "with respect to a request by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity." Following the economic collapse of 2008, there remains no issue of greater pressing concern to the American public at this time than the mortgage foreclosure crisis.

<sup>7</sup> A copy of Justice's September 22 letter is here attached as Exhibit D.

<sup>8</sup> A copy of Judicial Watch's July 5 appeal is here attached as Exhibit E.

<sup>9</sup> 5 U.S.C. § 552 (a)(2)(D) provides in pertinent part that:

Each agency, in accordance with published rules, shall make available for public inspection and copying copies of all records which have been released to any person . . . and which, because of the nature of their subject matter . . . are likely to become the subject of subsequent requests for substantially the same records.

*See, also, Caton v. Norton*, 2005 DNH 155 (D.N.H. 2005) ("when the records in question have already been disclosed, an agency cannot credibly claim that releasing them in response to a FOIA request will impede the proper functioning of the administrative process or inhibit the free and frank exchange of opinions among government personnel, because the agency has already indicated a diminished expectation of privacy concerning these documents through its prior voluntary disclosure").

**Justice**

**Sept. 27, 2011**

means within twenty (20) days of the agency's receipt of a request. 5 U.S.C. § 552 (a)(6)(A)(i). The demand for diligence is further underscored by a related APA provision respecting informal agency actions, including the disposition of a FOIA request. "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person. . . ." 5 U.S.C. § 555 (e). Moreover, "to ensure that agencies no longer skirted the statutory time limit," FOIA was amended in 2007 to clarify what constituted the appropriate method and extent of tolling as well as adding fee waiver consequences for noncompliance.<sup>10</sup> *Bensman v. National Park Service*, 2011 U.S. Dist. LEXIS 88380 (D.D.C. Aug. 10, 2011).

In the instant case, Justice received Judicial Watch's FOIA by fax on May 17 and acknowledged receiving a print copy on May 27. Twenty days have elapsed four times since then and Justice has yet to make available to this requester any of the 346 pages of responsive records that, by its own admission, the agency has uncovered pursuant to a search of records in its custody and control at the time Justice received Judicial Watch's request. Thus, withholding for the reasons and under the terms given by Justice not only violates FOIA's deadline for compulsory compliance but strongly suggests bad faith on Justice's part in reckless disregard of the APA based on the agency's unwillingness to perform a discrete, simple and mandatory task.<sup>11</sup>

## **II. Justice's Notice was Fatally Defective in Violation of FOIA and APA**

FOIA recognizes three permissible causes for brief delay in making "records

---

<sup>10</sup> 5 U.S.C. § 552 (a)(6)(A)(ii) provides in relevant part that:

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requests under this section.

<sup>11</sup> 5 U.S.C § 706 (2) provides in pertinent part that:

[A] reviewing court shall compel agency action unlawfully withheld or unreasonably delayed; and hold unlawful and set aside agency action . . . found to be—

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (C) in excess of statutory . . . limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (F) unwarranted by the facts . . . .

**Justice**

**Sept. 27, 2011**

promptly available to any person.” 5 U.S.C. § 552 (a)(3)(A). The three causes are grouped under the rubric of “unusual circumstances,” meaning a set of surrounding facts that are rarely encountered.<sup>12</sup> One such circumstance is the need to search and collect responsive records from field offices. 5 U.S.C. § 552 (a)(6)(B)(iii)(I). Another permissible delay entails the processing of voluminous yet distinct records. 5 U.S.C. § 552 (a)(6)(B)(iii)(II). The last justification is “the need for consultation . . . with another agency having a substantial interest in the determination of the request. . . .” 5 U.S.C. § 552 (a)(6)(B)(iii)(III). Under “unusual circumstances,” ordinary time limits “may be extended by written notice to the person making such request. . . .” 5 U.S.C. § 552 (a)(6)(B)(i). However, a mere warning of ensuing tardiness is inadequate. At a minimum, the notice must contain two elements: (1) information “setting forth the unusual circumstances for such extension” and (2) “the date on which a determination is expected to be dispatched.” *Id.* The projected date of dispatch shall not add more than ten (10) days to a requester’s wait. *Id.* And, even where ten (10) extra days would not suffice, exceptional circumstances must be shown and fulfillment still be concluded “with all practicable speed.” 5 U.S.C. § 552 (a)(6)(B)(iii)(III). All practicable speed, for purposes of FOIA, means delaying “only to the extent reasonably necessary to the proper processing of the particular requests.” 5 U.S.C. § 552 (a)(6)(B)(iii).

Justice never cited one of the three statutory circumstances for delay in its June 6 letter,<sup>13</sup> nor did it set forth specifics establishing anything other than ordinary circumstances vis-à-vis its processing of request 2376216. Instead, in rather boilerplate, business-as-usual fashion, the agency simply declared by fiat that it would not comply with ordinary time limits nor with any possible extensions available under the statute. In fact, proffering only that additional offices would need to be searched, Justice provided no estimated date of dispatch and – as evidenced by its four-month delay in issuing a determination – did not act “with all practicable speed.” The agency’s extraordinary delay in denying Judicial Watch’s narrowly-tailored request again implicates the informal adjudication provision of the APA. The relevant portion of that statute states: “Except in affirming a prior denial or when the denial is self-explanatory, the [prompt] notice shall be accompanied by a brief statement of the grounds for denial.” 5 U.S.C. § 555 (e). To be fair, while Justice violated FOIA and the APA through its dilatory conduct and, ultimately, nondisclosure of responsive records, the agency’s September 22 denial letter did provide grounds for withholding even if those grounds are not cognizable at law, as

<sup>12</sup> Plain meaning of statutory language trumps any other interpretation of FOIA’s scope. To do otherwise would limit rather than expand the disclosure provisions formerly confined to Section 3 of the APA. *Milner v. Department of the Navy*, 131 S. Ct. 1259 (March 7, 2011).

<sup>13</sup> See note 5, *supra*.

Justice

Sept. 27, 2011

will be further elucidated in the next section.

### **III. Justice Shirked Duty to Disclose by Handing Off Responsive Records**

To qualify as agency records subject to FOIA, requested materials must: (1) have been created or obtained by the agency to which the FOIA request is directed, and (2) remain in the control of that agency at the time the request is placed. *U.S. Department of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). Control means “that the materials have come into the agency’s possession in the legitimate conduct of its official duties.” *Id.* In the instant case, Judicial Watch requested of Justice a set of audits and term sheet shown by several federal officials to a Huffington Post reporter in preparation of two news articles. Based on the content of those stories, as well as the substance of Justice’s denial letter, it is fair to conclude that Housing and Urban Development staffers developed the audits and term sheet at issue here. It also can be deduced that Justice came into possession of the audits and term sheet in the conduct of its official duties and prior to Judicial Watch’s May 17 FOIA request. Hence, Justice was duty-bound to process and disclose directly to Judicial Watch the 346 pages Justice’s search of its own records uncovered in response to request 2376216.

Once clear that the materials requested are subject to FOIA, and that the agency to which the request was directed either obtained or created those materials in the course of its official duties, all that remains is (for the agency resisting disclosure of records in its possession upon receipt of a relevant FOIA request) to establish that it has not improperly withheld documents responsive to that request. *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). By its September 22 letter, Justice suggests that HUD’s “originat[ion]” of responsive documents in Justice’s possession entitled Justice to refer Judicial Watch’s FOIA request to HUD for further processing. This argument is as unavailing today as it was when Justice presented it to the U.S. Supreme Court in 1989:

[Reading a]n authorship-control requirement [into an agency’s obligation to disclose documents in its possession upon receipt of a request] would sharply limit “agency records” essentially to documents generated by the agencies themselves. This result is incompatible with the FOIA’s goal of giving the public access to *all* nonexempted information received by an agency as it carries out its mandate.

*Tax Analysts*, 492 U.S. at 147 (emphasis added).

**Justice**

**Sept. 27, 2011**

Hence, regardless of which agency authored records responsive to Judicial Watch's FOIA request to Justice, Justice can only discharge the duty triggered in Justice by request 2376216 under the terms of FOIA by disclosing responsive documents in Justice's possession directly to Judicial Watch. Indeed, interagency consultation for proper processing of a FOIA was an unusual -- albeit, likely -- eventuality contemplated by Congress and provided for in the statute. 5 U.S.C. § 552 (a)(6)(B)(iii)(III). However, the relief given an agency facing such circumstances is a 10-day extension in fulfilling the request, not permanent abdication of its disclosure obligations. To permit otherwise would invite a shell-game that it is FOIA's chief purpose to avert.<sup>14</sup> If accountability is to mean anything in a democratic republic, it is that public servants let their employer -- the U.S. taxpayer -- know what they're up to anytime the boss wants a progress report.<sup>15</sup>

#### **IV. Request for Relief**

Consequently, in light of the facts that:

- Judicial Watch presented to Justice such a narrowly-tailored and specific request, seeking only two documents already made public through one news outlet, which touch on a topic of the utmost public concern

and

- Justice was entitled to delay -- but not deny via referral -- disclosure of responsive records in its possession at the time of Judicial Watch's request, given that authorship is not dispositive in recognizing or discharging a FOIA duty

then Judicial Watch hereby respectfully requests that Justice decide this administrative appeal favorably to the requester and cause the relevant division to produce, with all practicable speed, the 346 pages in responsive records Justice's search apparently

---

<sup>14</sup> See, e.g., *Judicial Watch v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006)(it is "the strong policy of the FOIA that the public is entitled to know what its government is doing and why").

<sup>15</sup> This is not to suggest that there should be no routine protocols for lodging such requests. This is to say only that, to the extent a requester has followed all reasonable protocols for making her requests known, the request should be fulfilled in accordance with the letter and spirit of the statutes that govern the transaction.

**Justice**

**Sept. 27, 2011**

unearthed. If you do not understand this appeal or any portion thereof, please contact FOIA Program Manager John Althen immediately at (202) 646-5172 or [jalthen@judicialwatch.org](mailto:jalthen@judicialwatch.org). Judicial Watch anticipates receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days.<sup>16</sup>

Sincerely,

A handwritten signature in black ink, appearing to read 'Lisette Garcia', with a stylized flourish at the end.

Lisette Garcia, J.D.  
Senior Investigator

---

<sup>16</sup> 5 U.S.C. § 552 (a)(4)(A)(viii) provides that:

An agency shall not assess search fees (or in the case of a requester described [as “a representative of the news media”], duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6), if no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.



**Judicial  
Watch®**  
*Because no one  
is above the law!*

Exhibit  
A

May 17, 2011

**VIA CERTIFIED MAIL & FACSIMILE (202) 619-8365**

Melanie Pustay, Information Officer  
FOIA/PA Mail Referral Unit  
Department of Justice  
Room 115  
LOC Building  
Washington, DC 20530-0001  
(301) 583-7354  
(301) 341-0772 fax

**Re: EXPEDITED PROCESSING REQUESTED for Set of Audits & Term Sheet**

Dear Ms. Pustay:

At 4:42 p.m. on May 16, 2011, Shahien Nasiripour of The Huffington Post published online a news article asserting that four federal officials had briefed him on a set of audits accusing "the nation's five largest mortgage companies of defrauding taxpayers in their handling of foreclosures on homes purchased with government-backed loans." In the next to last paragraph of the May 16 article, Nasiripour further referred to a term sheet that federal officials had disclosed to him the week before.

That term sheet was the subject of a separate news article published at 8:26 p.m. on May 11, 2011. In that Huffington Post article, Nasiripour explained that the term sheet outlined a plan for "the creation of a federal account funded by the nation's 14 largest mortgage firms to help distressed borrowers avoid foreclosure and settle ongoing probes into faulty mortgage practices."

Despite the purportedly confidential nature of these records, federal courts agree that selective disclosure of matters in the public interest violates the letter and spirit of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.* See *Caton v. Norton*, 2005 DNH 155 (D.N.H. 2005) ("when the records in question have already been disclosed, an agency cannot credibly claim that releasing them in response to a FOIA request will impede the proper functioning of the administrative process or inhibit the free and frank exchange of opinions among government personnel, because the agency has already indicated a diminished expectation of privacy concerning these documents through its prior voluntary disclosure") (internal citations and quotation marks omitted); *Peck v. United States*, 514 F. Supp. 210, 212 (S.D.N.Y. 1981) (voluntary disclosure of the privileged communications may waive the privilege); *North Dakota ex rel. Olson v.*



**US DOJ**

**May 17, 2011**

*Andrus*, 581 F.2d 177, 182 (8th Cir. N.D. 1978)(“Preferential treatment of persons or interest groups fosters precisely the distrust of government that the FOIA was intended to obviate.”)

Accordingly, pursuant to FOIA, Judicial Watch, Inc., (Judicial Watch) hereby requests that the U.S. Justice Department (Justice) produce within twenty (20) business days:

- 1) The set of audits accusing “the nation’s five largest mortgage companies of defrauding taxpayers in their handling of foreclosures on homes purchased with government-backed loans”; and,
- 2) The term sheet outlining for “the creation of a federal account funded by the nation’s 14 largest mortgage firms to help distressed borrowers avoid foreclosure and settle ongoing probes into faulty mortgage practices.”

In placing this request, Judicial Watch directs the Justice’s attention to President Obama’s January 21, 2009 Memorandum concerning FOIA which states:

All agencies should adopt a presumption in favor of disclosure in order to renew their commitment to the principles embodied in FOIA...The presumption of disclosure should be applied to all decisions involving FOIA.<sup>1</sup>

The memorandum goes on to state that FOIA “should be administered with a clear presumption: In the case of doubt, openness prevails.” Nevertheless, if any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

Judicial Watch also hereby requests a waiver of both search and duplication fees pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii)(II) and 552(a)(4)(A)(iii). Judicial Watch is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because it is a member of the news media. *See National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Judicial Watch has also been recognized as a member of the news media in other FOIA litigation. *See Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000); and, *Judicial Watch, Inc. v.*

---

<sup>1</sup> Freedom of Information Act. Pres. Mem. of January 21, 2009, 74 Fed. Reg. 4683.

**US DOJ**

**May 17, 2011**

*Department of Defense*, 2006 U.S. Dist. LEXIS 44003, \*1 (D.D.C. June 28, 2006). Judicial Watch regularly obtains information about the operations and activities of government through FOIA and other means, uses its editorial skills to turn this information into distinct works, and publishes and disseminates these works to the public. It intends to do likewise with the records it receives in response to this request.

Judicial Watch also is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records:

shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

U.S.C. § 552(a)(4)(A)(iii).

In addition, if records are not produced within twenty (20) business days, Judicial Watch is entitled to a complete waiver of search and duplication fees under Section 6(b) of the OPEN Government Act of 2007, which amended FOIA at 5 U.S.C. § 552(a)(4)(A)(viii).

Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of the federal government and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its analysis, as well as the records themselves, as a special written report. Judicial Watch will also educate the public via radio programs, Judicial Watch's website, and/or newsletter, among other outlets. It also will make the records available to other members of the media or researchers upon request. Judicial Watch has a proven ability to disseminate information obtained through FOIA to the public, as demonstrated by its long-standing and continuing public outreach efforts.

Given these circumstances, Judicial Watch is entitled to a public interest fee waiver of both search costs and duplication costs. Nonetheless, in the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to \$350.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts. In an effort to facilitate record production within the statutory time limit, Judicial

**US DOJ**

**May 17, 2011**

Watch is willing to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, Judicial Watch will also accept the "rolling production" of documents.

If you do not understand this request or any portion thereof, or if you feel you require clarification, please immediately contact Judicial Watch FOIA Manager John Althen at 202-646-5172 or [jalthen@judicialwatch.org](mailto:jalthen@judicialwatch.org). Judicial Watch looks forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to be "Lisette Garcia", written over a circular stamp or seal.

Lisette Garcia, J.D.  
Senior Investigator

Obama Administration Pushing For Homeowner Fund While State ... Page 2 of 7

## Obama Administration Pushing For Homeowner Fund While State Officials Try To Levy Fines In Ongoing Mortgage Probes



Exhibit  
B

First Posted: 05/11/11 08:26 PM ET Updated: 05/11/11 08:52 PM ET

React

>

[Inspiring](#)

[Greedy](#)

[Typical](#)

[Scary](#)

[Outrageous](#)

[Amazing](#)

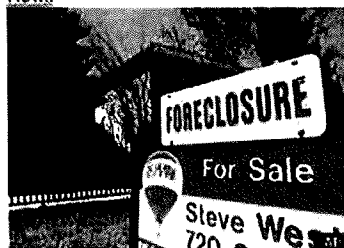
[Innovative](#)

[Infuriating](#)

[Follow](#)

>

[Mortgage Crisis](#), [Justice Department](#), [Mortgage Fraud](#), [Treasury Department](#), [Hamp](#), [Robosigners](#), [Business News](#)



WASHINGTON -- The Obama administration is pushing for the creation of a federal account funded by the nation's 14 largest mortgage firms to help distressed borrowers avoid foreclosure and settle ongoing probes into faulty mortgage practices, according to a confidential term sheet reviewed by The Huffington Post.

The fund is one of three proposed by a coalition of state attorneys general and administration officials, which were discussed Tuesday with representatives of the nation's five largest mortgage firms. A second account would be funded by civil penalties and fines and used by states as they see fit. The third would be designated for homeowners directly harmed by bank abuses, like illegal home seizures and wrongful foreclosures.

While state officials are pushing for actual monetary damages, administration officials are looking to do something completely different: Rather than have banks shell out cash to settle claims or in admitting wrongdoing, the administration wants to create spending targets for each firm's efforts to help troubled homeowners. And for every dollar the firms spend, their accounts would be credited.

The probes are focused on improper home repossessions and flawed -- and sometimes illegal -- foreclosure practices. Investigations were launched last fall after the nation's largest lenders voluntarily halted home seizures when defective document practices -- like so-called "robo-signing" -- came to light, erupting into a national scandal. State officials, Obama administration policy makers and bankers are discussing possible settlements this week in a hotel outside Washington, D.C.

Confidential Federal Audits Accuse Five Biggest Mortgage Firms ... Page 2 of 7

## Confidential Federal Audits Accuse Five Biggest Mortgage Firms Of Defrauding Taxpayers [EXCLUSIVE]



First Posted: 05/16/11 04:42 PM ET Updated: 05/17/11 05:43 PM ET

React



[Inspiring](#)

[Greedy](#)

[Typical](#)

[Scary](#)

[Outrageous](#)

[Amazing](#)

[Innovative](#)

[Infuriating](#)

[Follow](#)



[Bank Of America](#), [Citigroup](#), [Foreclosure News](#), [Ally Financial](#), [Consumer Financial Protection Bureau](#), [Department Of Housing And Urban Development](#), [False Claims Act](#), [Federal Housing Administration](#), [Foreclosure Fraud](#), [HUD IG](#), [JPMorgan Chase](#), [Wells Fargo](#), [Exclusive](#), [Foreclosure Investigation](#), [State Attorneys General](#), [Business News](#)



WASHINGTON -- A set of confidential federal audits accuse the nation's five largest mortgage companies of defrauding taxpayers in their handling of foreclosures on homes purchased with government-backed loans, four officials briefed on the findings told The Huffington Post.

The five separate investigations were conducted by the Department of Housing and Urban Development's inspector general and examined Bank of America, JPMorgan Chase, Wells Fargo, Citigroup and Ally Financial, the sources said.

The audits accuse the five major lenders of violating the False Claims Act, a Civil War-era law crafted as a weapon against firms that swindle the government. The audits were completed between February and March, the sources said. The internal watchdog office at HUD referred its findings to the Department of Justice, which must now decide whether to file charges.

The federal audits mark the latest fallout from the national foreclosure crisis that followed the end of a long-running housing bubble. Amid reports last year that many large lenders improperly accelerated foreclosure proceedings by failing to amass required paperwork, the federal agencies launched their own probes.



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

JUN 06 2011

Exhibit  
C

Ms. Lisette Garcia  
Senior Investigator  
Judicial Watch  
425 Third St., S.W., Suite 800  
Washington, DC 20024

Re: AG/11-00795  
DAG/11-00796  
ASG/11-00797  
CLM:LAD:KAS

Dear Ms. Garcia:

This is to acknowledge receipt of your Freedom of Information Act (FOIA) request dated May 17, 2011, and received in this Office on May 27, 2011, in which you requested a set of audits and a term sheet regarding mortgage companies, which were referenced in a May 16, 2011 article from *The Huffington Post*. Please be advised that, while your letter was initially sent to the FOIA/PA Mail Referral Unit, Justice Management Division, because it was addressed to Melanie Pustay, the Director of the Office of Information Policy (OIP), it was forwarded to OIP for processing. This response is made on behalf of the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General.

In your letter you requested expedited processing of this request. For your request to be considered for expedited processing, your letter must indicate the basis on which you seek such treatment. Requests will be taken out of chronological order based on the date of receipt and given expedited treatment only when it is determined that they involve: (1) circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; (2) an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information; (3) the loss of substantial due process rights; or (4) a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence. See 28 C.F.R. § 16.5 (d)(1) (2010). This Office makes the determination regarding the first three categories and the Department's Director of Public Affairs makes the decision regarding the fourth category. See id. § 16.5 (d)(2). Requesters seeking expedited processing are required to submit a statement explaining in detail the basis for their request for expedited processing. See id. § 16.5 (d)(3). This statement must be certified to be true and correct. See id. You have not provided such a statement. As a result, your request for expedited processing is not properly made. Once the required certified explanation of the basis for seeking expedited processing is provided, we will make a decision under the appropriate standard. Nevertheless, please be advised that your request has been assigned to a FOIA Specialist in this Office and record searches are being initiated in the Offices of the Attorney General, Deputy Attorney General, and the Associate Attorney General.

Because the records you seek require searches in other Offices, our staff has not yet been able to complete the searches to determine whether there are records within the scope of your request. Accordingly, we will be unable to comply with the twenty-working day time limit in this

-2-

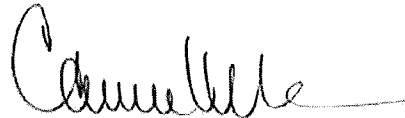
case as well as the ten additional days provided by the statute. In an effort to speed up our record searches, you may wish to narrow the scope of your request to limit the number of potentially responsive records or agree to an alternative time frame for processing, should records be located; or you may wish to await the completion of our record searches to discuss either of these options.

Please be advised that we have not made a decision on your request for a fee waiver. We will do so after we determine whether fees will be assessed for this request. I note from your letter that in the event a fee waiver is not granted, you agree to pay up to \$350.

I regret the necessity of this delay, but I assure you that your request will be processed as soon as possible. If you have any questions or wish to discuss an alternative time frame for processing of your request, you may contact Kyra Smerkanich, the analyst processing your case, by telephone at the above number, or you may write to her at the address below, or via e-mail at [kyra.smerkanich@usdoj.gov](mailto:kyra.smerkanich@usdoj.gov). You may also call our FOIA Public Liaison at the telephone number listed above to discuss any aspect of your request.

If you are not satisfied with my action on your request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001. Your appeal must be received within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink, appearing to read 'Carmen L. Mallon', with a long horizontal line extending to the right.

Carmen L. Mallon  
Chief of Staff



**U.S. Department of Justice**

**Office of Information Policy**

Telephone: (202) 514-3642

Washington, D.C. 20530

Ms. Lisette Garcia  
Senior Investigator  
Judicial Watch  
425 Third St., S.W., Suite 800  
Washington, DC 20024

SEP 22 2011

Re: AG/11-00795 (F)  
DAG/11-00796 (F)  
ASG/11-00797 (F)  
CLM:DRH:KAS

Exhibit

D

Dear Ms. Garcia:

This is a final response to your Freedom of Information Act (FOIA) request dated May 17, 2011, and received in this Office on May 27, 2011, in which you requested a set of audits and a term sheet regarding mortgage companies which were referenced in a May 16, 2011 article from *The Huffington Post*. This response is made on behalf of the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General.

Please be advised that a search was conducted in the Office of the Attorney General, as well as in the Departmental Executive Secretariat, which is the official records repository for the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General, and no records responsive to your request were located.

Searches were also conducted in the Offices of the Deputy Attorney General and Associate Attorney General and nine documents, totaling 346 pages, were located that are responsive to your request. Because these records originated with the Department of Housing and Urban Development (HUD), we have referred these documents to HUD for processing and direct response to you. Should you have any questions regarding these documents, you may contact HUD at the following address:

Cynthia O'Connor  
Office of the Executive Secretariat  
Department of Housing and Urban Development  
Room 10139  
451 7<sup>th</sup> Street, SW  
Washington, DC 20410-3000

If you are not satisfied with my response on this request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001. Your appeal must be received within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink, appearing to read "C. Mallon".

Carmen L. Mallon  
Chief of Staff





**Judicial  
Watch<sup>(®)</sup>**

*Because no one  
is above the law!*

Exhibit  
E

July 5, 2011

**VIA CERTIFIED MAIL & FACSIMILE (202) 514-1009**

Melanie Pustay, Director  
Office of Information Policy  
U.S. Department of Justice  
1425 New York Ave., N.W.  
Suite 11050  
Washington, D.C. 20530-0001

**Re: FOIA Appeal Re: 2376216 Seeking a Set of Audits and Term Sheet**

Dear Ms. Pustay:

This letter timely appeals two adverse determinations within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. § 552,<sup>1</sup> and the Administrative Procedure Act (APA), 5 U.S.C. § 551,<sup>2</sup> respecting 2376216, a request for documents placed with the U.S. Department of Justice (Justice) on May 17, 2011 by Judicial Watch, Inc., (Judicial Watch).<sup>3</sup> Request 2376216 sought, by expedited processing, two documents publicized by Shahien Nasiripour in the Huffington Post on May 11 and May 16, respectively.<sup>4</sup> This appeal does not challenge Justice's refusal to expedite its processing of request 2376216; rather, Judicial Watch respectfully appeals Justice's express determination not to:

<sup>1</sup> FOIA provides in pertinent part "the right of [a requester] to appeal to the head of the agency any adverse determination." 5 U.S.C. § 552 (a)(6)(A)(i).

<sup>2</sup> *Reliance Electric Co. v. Consumer Product Safety Cmsn.*, 924 F.2d 274, 277 (D.C. Cir. 1991) (reasoning that, apart from the substantive elements expressly addressed within 5 U.S.C. § 552(b), there is a procedural aspect to an agency's compliance with FOIA which constitutes an "informal adjudication" subject to judicial review per terms set forth in the Administrative Procedure Act, 5 U.S.C. § 706) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 287, 317-18, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325 (D.C. Cir. 1989); and, *AT&T Information-Systems, Inc. v. General Services Admin.*, 258 App. D.C. 254, 810 F.2d 1233, 1236 (D.C. Cir. 1987)).

<sup>3</sup> The original FOIA is attached to this appeal and labeled Exhibit A.

<sup>4</sup> Relevant portions of the referenced articles are attached here as Exhibit B.

**Justice Department**

**July 5, 2011**

- (1) comply with the ordinary statutory deadline; and,
- (2) not to comply with the extended deadline available under narrowly-defined unusual circumstances not present here.

On behalf of the Attorney General, his Deputy, and all Associates, Chief of Staff Carmen L. Mallon notified Judicial Watch by letter dated June 6, 2011<sup>5</sup> that expedited processing of this request had been denied. The letter further stated that Justice did not intend to comply with FOIA's 20-day statutory deadline nor with a 10-day extension which an agency can invoke only by demonstrating certain qualifying circumstances. The letter further invited Judicial Watch "to narrow the scope of [its] request to limit the number of potentially responsive records" which were likely to be generated by Justice's eventual search.

First, Judicial Watch cannot further narrow the scope of its request since the FOIA only sought two items<sup>6</sup> which Justice has already shared with at least one media organization<sup>7</sup>. Second, Judicial Watch urges Justice to reconsider its express decision not to comply with FOIA's statutory deadline and emergency extension because, under the present circumstances, the agency's decision to delay fulfillment indefinitely also has the effect of violating terms of the APA.<sup>8</sup> Having been made the subject of several news

---

<sup>5</sup> A copy of Ms. Mallon's June 6, 2011, letter is here attached as Exhibit C.

<sup>6</sup> 5 U.S.C. § 552 (a)(3)(A) states in pertinent part that:

[E]ach agency, upon any request for records which reasonably describes such records and is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

<sup>7</sup> 5 U.S.C. § 552 (a)(2)(D) provides in pertinent part that:

Each agency, in accordance with published rules, shall make available for public inspection and copying copies of all records which have been released to any person . . . and which, because of the nature of their subject matter . . . are likely to become the subject of subsequent requests for substantially the same records.

*See, also, Caton v. Norton*, 2005 DNH 155 (D.N.H. 2005) ("when the records in question have already been disclosed, an agency cannot credibly claim that releasing them in response to a FOIA request will impede the proper functioning of the administrative process or inhibit the free and frank exchange of opinions among government personnel, because the agency has already indicated a diminished expectation of privacy concerning these documents through its prior voluntary disclosure").

<sup>8</sup> 5 U.S.C § 706 provides in pertinent part that:

[A] reviewing court shall compel agency action unlawfully withheld or unreasonably delayed; and hold unlawful and set aside agency action . . . found to be—

**Justice Department**

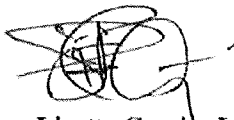
**July 5, 2011**

articles by virtue of Justice's selective disclosure of them to an individual reporter, the documents in question would not likely be hard to locate and are of paramount public interest.<sup>9</sup> Hence, withholding for the reasons and under the terms given by Justice not only violates FOIA's deadline for compulsory compliance but strongly suggests bad faith on the part of the agency based on its unwillingness to perform a discrete, simple and mandatory task.

Consequently, in light of the fact that Judicial Watch presented such a narrowly-tailored request, seeking only two documents already made public through one news outlet, which touch on a topic of the utmost public concern, Judicial Watch hereby respectfully requests that the agency decide this administrative appeal favorably and cause the relevant division to produce the two items requested with all practicable speed.

If you do not understand this appeal or any portion thereof, please contact FOIA Program Manager John Althen immediately at (202) 646-5172 or [jalthen@judicialwatch.org](mailto:jalthen@judicialwatch.org). Judicial Watch anticipates receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days of its original receipt by the agency.<sup>10</sup> Thank you for your cooperation.

Sincerely,



Lisette Garcia, J.D.  
Senior Investigator

- 
- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (C) In excess of statutory . . . limitations;
  - (D) without observance of procedure required by law;
  - (F) unwarranted by the facts . . . .

<sup>9</sup> See, e.g., *Judicial Watch v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006)(it is "the strong policy of the FOIA that the public is entitled to know what its government is doing and why").

<sup>10</sup> 5 U.S.C. § 552 (a)(6)(A)(ii) provides in relevant part that:

The 20-day period under clause (i) shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event not later than ten days after the request is first received by any component of the agency that is designated in the agency's regulations under this section to receive requestsw under this section.

## **Exhibit 2**



U.S. Department of Justice  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

**NOV 23 2011**

Ms. Lisette Garcia  
Judicial Watch  
Suite 800  
425 Third Street, SW  
Washington, DC 20024

Re: Appeal Nos. AP-2012-00016,  
AP-2012-00056 & AP-2012-00057  
Request Nos. AG/11-00795 (F),  
DAG/11-00796 (F) & ASG/11-00797 (F)  
KWC:BT

Dear Ms. Garcia:

You appealed from the action of the Initial Request Staff (IR Staff) of the Office of Information Policy (OIP), acting on behalf of the Offices of the Attorney General, Deputy Attorney General, and Associate Attorney General, on your request for access to a set of audits and a term sheet pertaining to certain mortgage companies that were referenced in a May 16, 2011 article in *The Huffington Post*. I note that you have limited your appeal to challenging the IR Staff's referral of records and failure to timely respond to your request.

After carefully considering your appeal, I am affirming the IR Staff's action on your request. The IR Staff properly referred 346 pages of records to the Department of Housing and Urban Development (HUD) for processing and direct response to you. This referral was proper and in accordance with Department of Justice regulations. See 28 C.F.R. § 16.4 (2011). If you have any questions concerning the status of this referral, please contact HUD directly. You may appeal any future adverse determination made by HUD.

With regard to your appeal of the IR Staff's failure to timely respond to your request, because the IR Staff has responded to your request, your appeal from the IR Staff's failure to timely respond is moot.

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the actions of the IR Staff in response to your request.

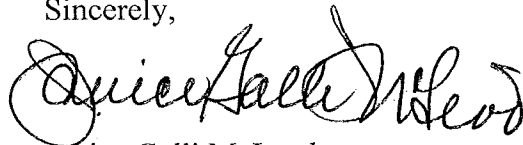
If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information

- 2 -

Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 301-837-1996; toll free at 1-877-684-6448; or facsimile at 301-837-0348.

Sincerely,

A handwritten signature in black ink, appearing to read "Janice Galli McLeod". The signature is fluid and cursive, with the first name "Janice" being the most prominent.

Janice Galli McLeod  
Associate Director

## **Exhibit 3**

## TRANSMISSION VERIFICATION REPORT

TIME : 09/26/2011 12:24  
 NAME : JUDICIAL WATCH  
 FAX : 2026460190  
 TEL : 2026465172  
 SER.# : 000G8N646578

DATE, TIME	09/26 12:15
FAX NO./NAME	2024012505
DURATION	00:09:01
PAGE(S)	17
RESULT	OK
MODE	STANDARD

425 Third St. SW, Suite 800  
 Washington, DC 20024  
 Phone: 202-646-5172  
 Fax: 202-646-5199

**Judicial Watch**

# Fax

To: John McCarty From: Lisette Garcia  
 Fax: 202 401 2505 Date: 26 Sept 2011  
 Re: FOIA APPEAL Pages: (including cover) 17

☒ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Print to follow via cert. mail:

7011 0470 0001 2912 1105

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT  
 OF THE RETURN ADDRESS, FOLD AT DOTTED LINE

**CERTIFIED MAIL™**



7011 0470 0001 2912 1105





**Judicial  
Watch®**  
*Because no one  
is above the law!*

September 26, 2011

**VIA CERTIFIED MAIL & FACSIMILE 202-401-2505**

Acting Deputy Inspector General John P. McCarty  
U.S. Department of Housing and Urban Development  
451 Seventh St., S.W., Suite 8260  
Washington, D.C. 20410-4500  
(202) 708-0430

**Re: Appeal of FOIA Seeking a Set of Audits and Term Sheet**

**FOIA Control No.: 11-IGF-OIG/00087**

**FOIA Tracking No.: F110486251GB**

Dear Mr. McCarty:

This letter timely appeals three adverse determinations within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. § 552,<sup>1</sup> and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*,<sup>2</sup> respecting a request for documents placed with the U.S. Department of Housing and Urban Development (HUD) on May 17, 2011 by Judicial Watch, Inc., (Judicial Watch).<sup>3</sup> The request sought, by expedited processing, two documents publicized by Shahien Nasiripour in the Huffington Post on May 11 and May 16, respectively.<sup>4</sup> This appeal does not challenge HUD's refusal to expedite its

<sup>1</sup> FOIA provides in pertinent part "the right of [a requester] to appeal to the head of the agency any adverse determination." 5 U.S.C. § 552 (a)(6)(A)(i).

<sup>2</sup> *Reliance Electric Co. v. Consumer Product Safety Cmsn.*, 924 F.2d 274, 277 (D.C. Cir. 1991) (reasoning that, apart from the substantive elements expressly addressed within 5 U.S.C. § 552, there is a procedural aspect to an agency's compliance with FOIA which constitutes an "informal adjudication" subject to judicial review per terms set forth in the Administrative Procedure Act, 5 U.S.C. § 706) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 287, 317-18, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325 (D.C. Cir. 1989); and, *AT&T Information-Systems, Inc. v. General Services Admin.*, 258 App. D.C. 254, 810 F.2d 1233, 1236 (D.C. Cir. 1987)).

<sup>3</sup> The original FOIA is attached to this appeal and labeled Exhibit A.

<sup>4</sup> Relevant portions of the referenced articles are attached here as Exhibit B.

**HUD**

**Sept. 26, 2011**

processing of the request; rather, Judicial Watch respectfully appeals HUD's express determination not to:

- (1) meet the ordinary statutory deadline of twenty (20) days in which the agency was required to provide an initial determination;
- (2) comply with the ten (10) day extension statutorily available under narrowly-defined unusual circumstances not present here; and,
- (3) produce altogether any of the responsive documents in misplaced reliance on exemptions 5 U.S.C. § 552 (b)(5) and 5 U.S.C. § 552 (b)(7).<sup>5</sup>

#### **I. Basic Defiance of FOIA in Violation of APA**

On behalf of the Assistant Inspector General for Audit Randy W. McGinnis, Freedom of Information Act Officer Gwendolyn Beasley notified Judicial Watch by letter dated September 13, 2011<sup>6</sup> that the agency does not possess the records requested. Despite HUD's threshold declaration of nonpossession, however, the letter goes on nonsensically to state that the agency has decided to withhold in full records responsive to Judicial Watch's request.<sup>7</sup> Such conflicting declarations suggest that, in total

---

<sup>5</sup> HUD also declares in its denial that "there may be other exemptions" which it has "not addressed in this response" yet "expressly reserve[s]". Because a requester cannot be expected to overcome arguments not fully fleshed out, and as the span of time for appealing agency determinations is finite and brief, Judicial Watch believes that no court will entertain any undefined excuses for withholding responsive documents in violation of FOIA. To hold otherwise would undermine the main thrust of the APA (from which FOIA flows), providing citizens with a prompt, orderly process for disputing executive branch action at the agency level. See, e.g., *National Resources Defense Council v. Environmental Protection Agency*, 683 F.2d 752 (3<sup>rd</sup> Cir. 1982)(indefinite postponement of finality aspect of agency action compromises substantive and procedural due process rights of aggrieved citizens).

<sup>6</sup> A copy of Ms. Beasley's September 13 letter is here attached as Exhibit C.

<sup>7</sup> This equivocal response is not sheltered under the *Glomar* doctrine because it bears none of the hallmarks set forth in Executive Order 13526, providing for the protection of national security information, nor its relative, Executive Order 13556, providing for uniform indexing of controlled unclassified information. First, HUD's answer does not conceal the fact that responsive documents exist; it only quibbles with HUD's possession of them. Second, it is unfathomable what national security purpose could be served by concealment of HUD possession. Third, even if the documents were deemed "Controlled Unclassified Information," such designation is to have no bearing on determinations requiring disclosure pursuant to FOIA. EO 13556 § 2(b). Besides, once the government admits the existence of a record, it loses all recourse to *Glomar*. See *Wilner v. NSA*, 592 F.3d 60, 70 (2d Cir. 2009)(citing *Wolf v. CIA*, 473 F.3d 370, 378-79 (D.C. Cir. 2007) and *Hudson River Stoop Clearwater, Inc. v. Department of the Navy*, 891 F.2d 414, 421 (2d Cir. 1989)).

**HUD****Sept. 26, 2011**

derogation of FOIA, HUD has failed altogether to conduct a reasonable search for responsive records or that, based on Judicial Watch's request, HUD has rid itself of them.<sup>8</sup> It is also fair to conclude, by extension, that HUD failed to undertake any segregability analysis. It is well-settled that an agency must undertake a segregability analysis prior to invoking any exemptions which could potentially excuse the agency's noncompliance with the disclosure statute that governs this transaction.<sup>9</sup> Substantial adherence to agency protocols is a due process issue which undergirds the APA.<sup>10</sup> Consequently, HUD compounds its injury to the requester because in defying FOIA<sup>11</sup> it defies the APA itself.

## **II. Playing Fast and Loose with Numbers of Consequence**

Also troubling are HUD's conflicting statements respecting time. The September 13 letter, which purports to represent the agency's final determination on the matter, states that it received Judicial Watch's May 17 FOIA on August 16 yet, anachronistically, claims to have responded to it on July 7.<sup>12</sup> Besides demonstrating an absolute lack of internal controls, the letter has the effect of confessing a lack of adherence to statutory fulfillment deadlines. In this case, the FOIA filed on May 17 came due on June 15

---

<sup>8</sup> "Until an agency executes a search of all its records, including those no longer in its immediate possession, it has not fulfilled its obligation under FOIA to execute a[n] adequate search." *Citizens for Responsibility & Ethics in Washington v. U.S. Department of Homeland Security*, 592 F. Supp. 2d 111, 117 (D.D.C. 2009).

<sup>9</sup> "An agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992)(quoting *Mead Data Central, Inc., v. Department of the Air Force*, 566 F.2d 242, 260). "The withholding agency must supply a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." *Id.*

<sup>10</sup> 5 U.S.C. § 706 (2)(D) provides in pertinent part that, "a reviewing court shall compel agency action unlawfully withheld or unreasonably delayed; and hold unlawful and set aside agency action . . . found to be without observance of procedure required by law."

<sup>11</sup> 5 U.S.C. § 552 (a)(3)(A) states in pertinent part that:

[E]ach agency, upon any request for records which reasonably describes such records and is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

<sup>12</sup> A copy of the U.S. Postal Service's confirmation of delivery on May 23 is here attached as Exhibit D.

HUD

Sept. 26, 2011

(weekends and holidays excluded) in regular time. Had the agency qualified for and timely sought a valid extension – such as for referral to a more appropriate unit within the agency -- the latest possible date for prompt fulfillment would have been June 29.<sup>13</sup> Yet, here we are, three months later, receiving first word that the agency doesn't have the records asked for and that, even if it did, it does not plan on giving them up.<sup>14</sup>

### III. Substantive Challenges

Exemptions not explained cannot be maintained. *Patterson v. IRS*, 56 F.3d 832, 836 (7th Cir. 1995) (“The government agency bears the burden of justifying its decision to withhold the requested information.”) Nevertheless, in an abundance of caution, Judicial Watch briefly addresses why HUD's bald claim to exemptions (b)(5) and (b)(7) in the present instance are patently bogus and inapplicable. *Cf. Kleissler v. United States Forest Serv.*, 183 F.3d 196, 200 (3d Cir. Pa. 1999) (exhaustion of administrative remedies entails preserving challenges for judicial redress by presenting them during the agency review phase of the proceedings). In the first place, all exemptions were waived by the government's prior intentional disclosure of the documents now being withheld. In the second, the particular exemptions cited have no application under these circumstances.

#### A. Privileges Intentionally Waived Are Irretrievably Lost

Federal courts agree that selective disclosure of matters in the public interest violates the letter and spirit of FOIA.<sup>15</sup> Moreover, as stated in the preamble to the initial FOIA request at issue here, “when the records in question have already been disclosed, an agency cannot credibly claim that releasing them in response to a FOIA request will impede the proper functioning of the administrative process or inhibit the free and frank

<sup>13</sup> 5 U.S.C. § 552 (a)(6)(B)(i) provides that “[i]n unusual circumstances . . . the time limits prescribed . . . may be extended by written notice” except “[n]o such notice shall specify a date that would result in an extension for more than ten working days. . . .”

<sup>14</sup> And, of course, there is the letter's third-prong “reserve” argument that essentially boils down to: *and, if our articulated grounds for noncompliance prove insufficient, we promise to come up with new grounds in the future that should somehow justify our present flouting of the law.*

<sup>15</sup> It is “the strong policy of the FOIA that the public is entitled to know what its government is doing and why.” *Judicial Watch v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006).

**HUD****Sept. 26, 2011**

exchange of opinions among government personnel, because the agency has already indicated a diminished expectation of privacy concerning these documents through its prior voluntary disclosure.” *Caton v. Norton*, 2005 DNH 155 (D.N.H. 2005 (internal citations and quotation marks omitted). See, also, *Peck v. United States*, 514 F. Supp. 210, 212 (S.D.N.Y. 1981)(voluntary disclosure of the privileged communications may waive the privilege); *North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8<sup>th</sup> Cir. N.D. 1978) (“Preferential treatment of persons or interest groups fosters precisely the distrust of government that the FOIA was intended to obviate.”)

Hence, where the government voluntarily has shared the documents in question with at least one media outlet, and those documents remain salient among the public at large, an agency may not later purport to shield those documents on the basis of confidentiality from subsequent FOIA requests by other media outlets.<sup>16</sup> However, even assuming that no intentional breach of confidentiality had here occurred to waive all exemption from disclosure, the privileges cited by HUD do not apply for the reasons that follow.

*B. Audits and a Term Sheet are Factual Compilations not Confidential Advice*

By its terms, exemption (b)(5) permits an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552 (b)(5). Though explaining in its denial that (b)(5) here pertains to “privileged” documents, HUD does not state with any particularity which common-law privileges it believes apply under the present circumstances nor how. Fortunately, the D.C. Circuit has already had an opportunity to pass on a FOIA dispute over audits the disclosure of which an agency tried to resist by invoking a (b)(5) privilege. In *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980), the court sharply distinguished “factual situations the auditor communicates to the attorneys that are encountered in the course of auditing third parties” from private counsel rendered in protection of an agency’s

---

<sup>16</sup> 5 U.S.C. § 552 (a)(2)(D) provides in pertinent part that:

Each agency, in accordance with published rules, shall make available for public inspection and copying copies of all records which have been released to any person . . . and which, because of the nature of their subject matter . . . are likely to become the subject of subsequent requests for substantially the same records.

**HUD****Sept. 26, 2011**

interests. Hence, it held that no privilege automatically adhered to a data compilation simply because it was prepared for review by government attorneys. Since this is the exact situation here, HUD is entitled to no (b)(5) privilege.

*C. Pendency of an Enforcement Proceeding Not Dispositive*

Meanwhile, exemption (b)(7) permits an agency to withhold “records or information compiled for law enforcement purposes,” but only to the extent that those records fall into one of six (6) further enumerated subcategories. 5 U.S.C. § 552 (b)(7)(A)-(F). HUD points to none of these subcategories in its principal argument.<sup>17</sup> Rather, it devises a new subcategory of its own – namely, “pending the determination of an enforcement proceeding.” Unfortunately, HUD’s duration rationale falls short of the statute’s textual requirement of showing that disclosure of the requested document would *interfere* with the enforcement proceeding, not merely coincide with it. 5 U.S.C. § 552 (b)(7)(A)(emphasis added). Indeed, even before reaching the subcategory stage, courts have demanded to see a connection between the agency’s particular law enforcement authority and the information contained in the withheld material. *Abdelfattah v. U.S. Department of Homeland Security*, 488 F.3d 178, 186 (3d Cir. 2007). HUD has here shown neither actual interference with a proceeding nor a connection between its own authority and the material withheld.

**IV. Request for Relief**

Consequently, in light of the fact that Judicial Watch<sup>18</sup> presented such a narrowly-tailored request, seeking only two documents already made public through one news outlet, which touch on mortgage foreclosure -- a topic of the utmost public concern,

<sup>17</sup> In the third-prong reserve argument, HUD cited, *inter alia*, 5 U.S.C. § 552 (b)(7)(C) by way of example of unclaimed exemptions it might yet seek to invoke. *Maydak v. United States DOJ*, 218 F.3d 760, 765 (D.C. Cir. 2000) (“merely stating that ‘for example’ an exemption might apply is inadequate to raise a FOIA exemption”). Had HUD adequately preserved this claim by its timely assertion, it would have nonetheless failed too as “[t]he protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations.” *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1185 (2011). And, even if a court were to decide otherwise somehow, this ground could only justify redaction of parties’ names and not a total withholding of all responsive documents. *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 896 (D.C. Cir. 1995).

<sup>18</sup> Judicial Watch is a media organization within the meaning of 5 U.S.C. § 552 (a)(4)(A)(ii)(II). See *Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F.Supp. 2d 52 (D.D.C. 2000).

**HUD**

**Sept. 26, 2011**

Judicial Watch hereby respectfully requests that the Inspector General's Office decide this administrative appeal favorably to the requester and cause the relevant division of HUD to produce the two items requested with all practicable speed.

If you do not understand this appeal or any portion thereof, please contact FOIA Program Manager John Althen immediately at (202) 646-5172 or [jalthen@judicialwatch.org](mailto:jalthen@judicialwatch.org). Judicial Watch anticipates receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days.<sup>19</sup> Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lisette Garcia', with a stylized flourish at the end.

Lisette Garcia, J.D.  
Senior Investigator

---

<sup>19</sup> 5 U.S.C. § 552 (a)(6)(A)(viii) provides in relevant part that:

An agency shall not assess search fees (or in the case of a requester described under clause (ii)(II), duplication fees) under this subparagraph if the agency fails to comply with any time limit under paragraph (6)

Exhibit A



**Judicial  
Watch®**  
*Because no one  
is above the law!*

May 17, 2011

**VIA CERTIFIED MAIL & FACSIMILE (202) 619-8365**

Shaun Donovan, Secretary  
U.S. Dept. of Housing & Urban Development  
Freedom of Information Act Office  
451 7th Street, SW, Room 10139  
Washington, DC 20410-3000  
Facsimile: (202) 619-8365

**Re: EXPEDITED PROCESSING REQUESTED for Set of Audits & Term Sheet**

Dear Mr. Shaun Donovan:

At 4:42 p.m. on May 16, 2011, Shahien Nasiripour of The Huffington Post published online a news article asserting that four federal officials had briefed him on a set of audits accusing "the nation's five largest mortgage companies of defrauding taxpayers in their handling of foreclosures on homes purchased with government-backed loans." In the next to last paragraph of the May 16 article, Nasiripour further referred to a term sheet that federal officials had disclosed to him the week before.

That term sheet was the subject of a separate news article published at 8:26 p.m. on May 11, 2011. In that Huffington Post article, Nasiripour explained that the term sheet outlined a plan for "the creation of a federal account funded by the nation's 14 largest mortgage firms to help distressed borrowers avoid foreclosure and settle ongoing probes into faulty mortgage practices."

Despite the purportedly confidential nature of these records, federal courts agree that selective disclosure of matters in the public interest violates the letter and spirit of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.* See *Caton v. Norton*, 2005 DNH 155 (D.N.H. 2005) ("when the records in question have already been disclosed, an agency cannot credibly claim that releasing them in response to a FOIA request will impede the proper functioning of the administrative process or inhibit the free and frank exchange of opinions among government personnel, because the agency has already indicated a diminished expectation of privacy concerning these documents through its prior voluntary disclosure") (internal citations and quotation marks omitted); *Peck v. United States*, 514 F. Supp. 210, 212 (S.D.N.Y. 1981) (voluntary disclosure of the privileged communications may waive the privilege); *North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. N.D. 1978) ("Preferential treatment of persons or interest groups fosters precisely the distrust of government that the FOIA was intended to



**HUD**

**May 17, 2011**

obviate.”)

Accordingly, pursuant to FOIA, Judicial Watch, Inc., (Judicial Watch) hereby requests that the U.S. Department of the Housing & Urban Development (HUD) produce within twenty (20) business days:

- 1) The set of audits accusing “the nation’s five largest mortgage companies of defrauding taxpayers in their handling of foreclosures on homes purchased with government-backed loans”; and,
- 2) The term sheet outlining for “the creation of a federal account funded by the nation’s 14 largest mortgage firms to help distressed borrowers avoid foreclosure and settle ongoing probes into faulty mortgage practices.”

In placing this request, Judicial Watch directs the HUD’s attention to President Obama’s January 21, 2009 Memorandum concerning FOIA which states:

All agencies should adopt a presumption in favor of disclosure in order to renew their commitment to the principles embodied in FOIA...The presumption of disclosure should be applied to all decisions involving FOIA.<sup>1</sup>

The memorandum goes on to state that FOIA “should be administered with a clear presumption: In the case of doubt, openness prevails.” Nevertheless, if any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

Judicial Watch also hereby requests a waiver of both search and duplication fees pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii)(II) and 552(a)(4)(A)(iii). Judicial Watch is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because it is a member of the news media. *See National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Judicial Watch has also been recognized as a member of the news media in other FOIA litigation. *See Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000); and, *Judicial Watch, Inc. v. Department of Defense*, 2006 U.S. Dist. LEXIS 44003, \*1 (D.D.C. June 28, 2006). Judicial Watch regularly obtains information about the operations and activities of

---

<sup>1</sup> Freedom of Information Act. Pres. Mem. of January 21, 2009, 74 Fed. Reg. 4683.

## HUD

May 17, 2011

government through FOIA and other means, uses its editorial skills to turn this information into distinct works, and publishes and disseminates these works to the public. It intends to do likewise with the records it receives in response to this request.

Judicial Watch also is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records:

shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

U.S.C. § 552(a)(4)(A)(iii).

In addition, if records are not produced within twenty (20) business days, Judicial Watch is entitled to a complete waiver of search and duplication fees under Section 6(b) of the OPEN Government Act of 2007, which amended FOIA at 5 U.S.C. § 552(a)(4)(A)(viii).

Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of the federal government and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its analysis, as well as the records themselves, as a special written report. Judicial Watch will also educate the public via radio programs, Judicial Watch's website, and/or newsletter, among other outlets. It also will make the records available to other members of the media or researchers upon request. Judicial Watch has a proven ability to disseminate information obtained through FOIA to the public, as demonstrated by its long-standing and continuing public outreach efforts.

Given these circumstances, Judicial Watch is entitled to a public interest fee waiver of both search costs and duplication costs. Nonetheless, in the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to \$350.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts. In an effort to facilitate record production within the statutory time limit, Judicial Watch is willing to accept documents in electronic format (e.g. e-mail, .pdfs). When necessary, Judicial Watch will also accept the "rolling production" of documents.

**HUD**

**May 17, 2011**

**If you do not understand this request or any portion thereof, or if you feel you require clarification, please immediately contact Judicial Watch FOIA Manager John Althen at 202-646-5172 or [jalthen@judicialwatch.org](mailto:jalthen@judicialwatch.org). Judicial Watch looks forward to receiving the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your cooperation.**

Sincerely,

A handwritten signature in black ink, appearing to be 'Lisette Garcia', written over a circular stamp or seal.

**Lisette Garcia, J.D.  
Senior Investigator**



React.

3

## Inspiring

Greedy

Ordinary  
Typical

## Scary

## Seary

## Outro

Outrageous  
Amazing

## Amazing Innovative

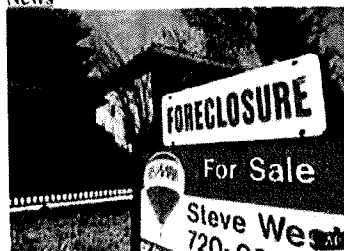
## Innovative Identification

Infuriating

Follow

✶

Mortgage Crisis, Justice Department, Mortgage Fraud, Treasury Department, Hamp, Robosigners, Business News



The fund is one of three proposed by a coalition of state attorneys general and administration officials, which were discussed Tuesday with representatives of the nation's five largest mortgage firms. A second account would be funded by civil penalties and fines and used by states

as they see fit. The third would be designated for homeowners directly harmed by bank abuses, like illegal home seizures and wrongful foreclosures.

The probes are focused on improper home repossessions and flawed -- and sometimes illegal -- foreclosure practices. Investigations were launched last fall after the nation's largest lenders voluntarily halted home seizures when defective document practices -- like so-called "robo-signing" -- came to light, erupting into a national scandal. State officials, Obama administration policy makers and bankers are discussing possible settlements this week in a hotel outside Washington, D.C.

Confidential Federal Audits Accuse Five Biggest Mortgage Firms ... Page 2 of 7

## Confidential Federal Audits Accuse Five Biggest Mortgage Firms Of Defrauding Taxpayers [EXCLUSIVE]



First Posted: 05/16/11 04:42 PM ET Updated: 05/17/11 05:43 PM ET

React

>

[Inspiring](#)

[Greedy](#)

[Typical](#)

[Scary](#)

[Outrageous](#)

[Amazing](#)

[Innovative](#)

[Infuriating](#)

[Follow](#)

>

[Bank Of America](#), [Citigroup](#), [Foreclosure News](#), [Ally Financial](#), [Consumer Financial Protection Bureau](#), [Department Of Housing And Urban Development](#), [False Claims Act](#), [Federal Housing Administration](#), [Foreclosure Fraud](#), [HUD IG](#), [JPMorgan Chase](#), [Wells Fargo](#), [Exclusive](#), [Foreclosure Investigation](#), [State Attorneys General](#), [Business News](#)



WASHINGTON -- A set of confidential federal audits accuse the nation's five largest mortgage companies of defrauding taxpayers in their handling of foreclosures on homes purchased with government-backed loans, four officials briefed on the findings told The Huffington Post.

The five separate investigations were conducted by the Department of Housing and Urban Development's inspector general and examined Bank of America, JPMorgan Chase, Wells Fargo, Citigroup and Ally Financial, the sources said.

The audits accuse the five major lenders of violating the False Claims Act, a Civil War-era law crafted as a weapon against firms that swindle the government. The audits were completed between February and March, the sources said. The internal watchdog office at HUD referred its findings to the Department of Justice, which must now decide whether to file charges.

The federal audits mark the latest fallout from the national foreclosure crisis that followed the end of a long-running housing bubble. Amid reports last year that many large lenders improperly accelerated foreclosure proceedings by failing to amass required paperwork, the federal agencies launched their own probes.

Exhibit C



U.S. Department of Housing and Urban Development  
**Office of Inspector General**  
451 Seventh Street, SW  
Washington, DC 20410-4500

SEP 13 2011

Lisette Garcia, J.D.  
Senior Investigator  
Judicial Watch  
425 Third Street, SW, Room 800  
Washington, DC 20024

RE: Freedom of Information Act Request  
FOIA Control No.: 11-IGF-OIG/00087  
FOIA Tracking No.: F110486251GB

Dear Ms. Garcia:

This is in response to your Freedom of Information Act (FOIA) request dated May 17, 2011 to the U.S. Department of Housing and Urban Development (HUD), Office of Inspector General (OIG), and our interim letter submitted to you on July 7, 2011. You have requested "... set of audits accusing the nation's five largest mortgage companies of defrauding taxpayers in their handling of foreclosures ... and the term sheet outlining for the creation of a federal account funded by the nation's 14 largest mortgage firms ...." Your request was received in this office on August 16, 2011.

First, we would like to address your request for a "term sheet". In our July 7, 2011 interim letter to you concerning a "term sheet", we indicated that our office does not possess the documents you are requesting, and therefore cannot release it. Second, the records that are responsive to your request are being withheld in full pursuant to 5 U.S.C. § 552(b)(5), which protects privileged documents. The records are also being withheld under 5 U.S.C. § 552(b)(7) pending a determination on the enforcement proceeding. Also, there may be other exemptions (e.g., 5 U.S.C. § 552(b)(3), (b)(6) and (b)(7)(C)) associated with these records that we have not addressed in this response and that we expressly reserve. At this time, we cannot give you a date as to when a final decision on any enforcement proceeding will be made.

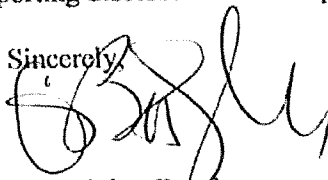
Please be advised that Randy W. McGinnis, Assistant Inspector General for Audit, is the official responsible for this response.

Lisette Garcia, J.D.  
FOIA Control No.: 11-IGF-OIG/00087  
FOIA Tracking No.: F110486251GB

2

The OIG's Freedom of Information Regulation, 24 C.F.R. § 2002.25, provides for administrative review by the Inspector General of any denial of information if a written appeal is filed within 30 days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Your appeal should be addressed to the Inspector General, 451 7th Street, SW, Suite 8260, Washington, DC 20410, and should be accompanied by a copy of your initial request, a copy of this letter, and your statement of circumstances, reasons and arguments supporting disclosure of the requested information.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Beasley', is written over the word 'Sincerely,'.

Gwendolyn Beasley  
Freedom of Information Act Officer

USPS.com® - Track &amp; Confirm

Page 1 of 1

Exhibit D

Customer Service

USPS Mobile

Register



Search USPS.com or Track

Quick Links

Ship a Package

Send Mail

Manage Your Mail

Shop

Business

## Track &amp; Confirm

GO TO TRACK BY DATE

PRINT DETAILS

YOUR LABEL NUMBER	SERVICE	STATUS OF YOUR ITEM	DATE & TIME	LOCATION	FEATURES
70103090000120438592		Delivered	May 23, 2011, 7:24 am	WASHINGTON, DC 20410	

## Check on Another Item

What's your label (or receipt) number?

Find

## LEGAL

Privacy Policy  
Terms of Use  
FOIA  
No FEAR Act EEO Data

## ON USPS.COM

Government Services  
Buy Stamps & Shop  
Print a Label with Postage  
Customer Service  
Site Index

## ON ABOUT.USPS.COM

About USPS Home  
Newsroom  
Mail Service Updates  
Forms & Publications  
Careers

## OTHER USPS SITES

Business Customer Gateway  
Postal Inspectors  
Inspector Careers  
Postal Express

Copyright© 2011 USPS. All Rights Reserved

## SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

## 1. Article Addressed to:

U.S. Department of Housing and  
Urban Development  
Freedom of Information Act Office  
451 7th Street, SW, Room 10139  
Washington, DC 20410-3000

2. Article Number  
(Transfer from service label)

7010 3090 0001 2043 8592

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

## COMPLETE THIS SECTION ON DELIVERY

## A. Signature

x K Williams

- ☐ Agent  
☐ Addressee

## B. Received by (Printed Name)

K Williams

## C. Date of Delivery

5-23-11

D. Is delivery address different from item 1? ☐ YesIf YES, enter delivery address below: ☐ No

## 3. Service Type

- ☒ Certified Mail ☐ Express Mail  
☐ Registered ☒ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

## 4. Restricted Delivery? (Extra Fee)

☐ Yes



## **Exhibit 4**



U.S. Department of Housing and Urban Development  
**Office of Inspector General**

451 7<sup>th</sup> St., S.W.  
Washington, D.C. 20410  
October 19, 2011

Tele: 202-708-1613  
Fax: 202-401-3778

John Althen  
FOIA Program Manager  
Judicial Watch  
425 Third Street SW, Ste 800  
Washington DC 20023

Re: Appeal of FOIA Seeking a Set of Audits and Term Sheet, FOIA Control No.: 11-IGF-OIG/00087; FOIA Tracking No.: F110486251GB; FOIA Appeal Control No.: 11-IGA-OIG-00013; FOIA Appeal Tracking No.: F110486746GB

Dear Mr. Althen,

This responds to Judicial Watch's Freedom of Information Act (FOIA) appeal dated September 26, 2011. You appeal Assistant Inspector General for Audit Randy W. McGinnis' September 13, 2011 denial, pursuant to 5 U.S.C. § 552(b)(5), 5 U.S.C. § 552(b)(7)<sup>1</sup> of your request for a "set of audits accusing the nation's five largest mortgage companies of defrauding taxpayers in their handling of foreclosures ... and the term sheet outlining a plan for the creation of a federal account funded by the national's 14 largest mortgage firms...." Upon due consideration, I deny your appeal.

You appeal HUD OIG's express determination not to produce any of the responsive documents based on exemptions 5 U.S.C. § 552(b)(5) and 5 U.S.C. § 552(b)(7).

You are correct in pointing out that we made an administrative error on the date of a letter in our correspondence with you. For purposes of clarification, you sent a letter dated May 17, 2011 to Secretary Shaun Donovan, U.S. Department of Housing and Urban Development (HUD). Ms. Dolores Cole, Director of FOIA and Executive Correspondence, Office of the Executive Secretariat, HUD, responded to you on June 14, 2011 and stated that HUD had no documents responsive to your request and advised you that the request was forwarded to HUD OIG for processing. Ms. Cole forwarded us your request via a letter dated June 14, 2011. That letter (and your request) was received in our office on June 20, 2011. On July 7, 2011, we provided you an interim response letting you know that we did not possess a "term sheet" and

---

<sup>1</sup> And other exemptions, specifically, 5 U.S.C. § 552(b)(3), 5 U.S.C. § 552(b)(6), and 5 U.S.C. § 552(b)(7)(C).

that we would be researching the releasability of the additional information you requested. We also indicated that we were consulting with other executive agencies which had an interest in the release of those documents. At that time we advised you that we expected to notify you by August 15, 2011 on the releasability of the documents. On September 13, 2011 we issued a response to your request and indicated again that we did not possess a "term sheet" and the additional records requested were being withheld pursuant to 5 U.S.C. § 552(b)(5) and 5 U.S.C. § 552(b)(7).

Your letter asserts in Paragraph I, Basic Defiance of FOIA in Violation of APA, that Ms. Beasley, FOIA Officer, in a letter dated September 13, 2011 denied that HUD OIG possessed the records requested. You further stated that "nonsensically" she went on to state that records were being withheld. The September 13, 2011 letter stated that HUD OIG was not in possession of a "term sheet". The letter did acknowledge that HUD OIG was in position of other records that were responsive to the request (i.e., what you referred to as audit reports), but that these documents were being withheld.

We did consider whether portions of the documents could be released and, after conducting a segregability analysis, concluded that they were no parts of the documents that could be released without interference with ongoing negotiations and investigations.

Substantive challenges to our denial of your FOIA are found in Paragraph III, Substantive Challenges, of your letter. Your initial request attaches two news articles from the Huffington Post discussing the possible creation of a federal account (the "term sheet") and federal audits of major lenders suggesting False Claims Act violations in the handling of foreclosures. You conclude from the articles that HUD OIG has previously released documents and therefore may not now claim they are protected under the FOIA. We have no record that HUD OIG has previously released to a member of the public the documents you request.<sup>2</sup> It is also important to note that these documents are still in draft.

Exemption 5 protects, "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency".<sup>3</sup> The documents requested were prepared for two reasons: to investigate allegations that national mortgage lenders/servicers were engaged in widespread questionable foreclosure practices involving the use of foreclosure "mills" and a practice known as "robo-signing"<sup>4</sup> of sworn documents in foreclosures throughout the United States and to improve the effectiveness of the Fair Housing Administration (FHA).

The current reports are predecisional in nature, and are part of the Agency's deliberative process. As stated in Chemical Manufacturers Assoc. v. Consumer Product Safety Comm., 600 F. Supp. 114, 118 (D.D.C. 1984):

<sup>2</sup> Further, just so there is no confusion, HUD OIG does not possess a "term sheet". We cannot release this document because we do not have this document.

<sup>3</sup> 5 U.S.C. § 552(b)(5) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat 2524.

<sup>4</sup> "Robo-signing" as used here refers to the practice by an employee or agent of the servicer of signing documents automatically without a due diligence review or verification of the facts.

Courts are being reminded more and more about the deference that they owe to administrative agencies in regard to the way these agencies conduct their business. *See generally Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 3329-30, 82 L. Ed. 2d 556 (1984); *Women's Equity Action League v. Bell*, 240 U.S. App. D.C. 42, 743 F.2d 42, 43 (D.C. Cir. 1984). There should be considerable deference to the Commission's judgment as to what constitutes, as our Court of Appeals has put it, "part of the agency give-and-take -- of the deliberative process -- by which the decision itself is made." *See Vaughn v. Rosen*, 523 F.2d at 1144. The Commission is better situated than either CMA or this Court to know what confidentiality is needed "to prevent injury to the quality of agency decisions," *N.L.R.B. v. Sears Roebuck & Co.*, *supra*, at 151, while the decision making process is in progress.

The records that you seek are unequivocally subject to the deliberative process privilege, and are thus protected from disclosure by 5 U.S.C. § 552(b)(5). The deliberative process privilege protects materials that are both pre-decisional and deliberative. *See Mapother v. U.S. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Petroleum Information Corp. v. U. S. Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992). As advised, the records that you seek are part of an ongoing review.

Further, the records you seek are exempt from disclosure under FOIA in accordance with 5 U.S.C. §552(b)(7)(A) which pertains to records or information compiled for law enforcement purposes, the release of which could be reasonably expected to interfere with a pending or prospective law enforcement proceeding. Additionally, DOJ has asked that we not release these records nor make them public because of potential criminal prosecution and ongoing civil and criminal settlement negotiations.

Exemption 7(A) authorizes the withholding of records or information compiled for law enforcement purposes to the extent that production of the records or information could reasonably be expected to interfere with enforcement proceedings. 5 U.S. C. §552(b)(7)(A). *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). As a general rule, Exemption 7(A) may be invoked so long as law enforcement proceedings remain pending. Please be advised that negotiations for a potential settlement in lieu of enforcement remain open as of this date. We have again reviewed the documents requested and we are satisfied that, at this time, release of any of its contents could reasonably be expected to interfere with ongoing enforcement proceedings/settlement negotiations. Again, this has been confirmed by DOJ.

Please note that our letter stated that we were expressly reserving other exemptions (e.g., 5 U.S.C. §552(b)(3), (b)(6) and (b)(7)(C)) associated with these records. In the event the initial two exemptions no longer prohibit release there are other exemptions that can come into play. In addition, portions of the records may also be exempt under the Privacy Act.

Accordingly, your appeal is denied in full. This is the final agency decision under 24 C.F.R. § 2002.25(e). You may seek judicial review of this decision in the United States District

Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, pursuant to 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in black ink, appearing to read "John P. McCarty". The signature is fluid and cursive, with the first name "John" being the most prominent part.

John P. McCarty  
Acting Deputy Inspector  
General